In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 206

Office-Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

MRS. ROBERT F. CALLAWAY, individually, MRS. ROBERT F. CALLAWAY, as Mother and Next Friend of her Minor Children Robert F. Callaway, Jr., Sandra K. Callaway and Richard E. Callaway,

Petitioners,

vs.

W. L. GARBER and UNITED STATES OF AMERICA,

Respondents.

STANLEY P. SORENSON, as Administrator of the Estate of Robert F. Callaway, Deceased,

Petitioner,

vs.

W. L. GARBER and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MYLES J. THOMAS,
517 Power Block—P. O. Box 235
Helena, Montana

Attorney for Petitioners

FLOYD O. SMALL,
Montana Club Building
Helena, Montana

Of Counsel

THURBER'S HELENA

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In the Supreme Court of the United States

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No._____

MRS. ROBERT F. CALLAWAY, individually, MRS. ROBERT F. CALLAWAY, as Mother and Next Friend of her Minor Children Robert F. Callaway, Jr., Sandra K. Callaway and Richard E. Callaway,

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STANLEY P. SORENSON, as Administrator of the Estate of Robert F. Callaway, Deceased,

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W. L. GARBER and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners, Mrs. Robert F. Callaway, individually, Mrs. Robert F. Callaway, as mother and next friend of her

minor children, Robert F. Callaway, Jr., Sandra K. Callaway and Richard E. Callaway and Stanley P. Sorenson, as administrator of the estate of Robert F. Callaway, deceased, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that court made and entered on April 21, 1961, affirming a decision of the United States District Court for the District of Montana made and entered on April 2, 1959 (New Trial denied Dec. 18, 1959) denying to petitioners the right to recover under the Federal Tort Claims Act, 28 U. S. C. A. §1346(b) and §2671 et seq.

OPINIONS BELOW

The United States District Court for the District of Montana made and entered findings of fact and conclusions of law and prepared a memorandum opinion on April 2, 1959 and these appear at pages 17-21 of the record and are appended hereto as appendix i-v. The decision of the United States Court of Appeals for the Ninth Circuit appears in and is appended hereto as Appendix vii-xii.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was made and entered on April 21, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1) and 28 U. S. C. A. §2101(c).

QUESTION PRESENTED FOR REVIEW

Did the courts below properly decide that these instant cases were controlled by the case of Feres vs. U. S., 340 U. S. 135, 95 L. Ed. 152, so as to preclude a recovery by the petitioners?

The courts below denied petitioners relief on the grounds that the deceased serviceman, at the time of his death, was "acting in line of duty" as that term was defined in the Feres case supra and they refused to follow Brooks vs. U. S., 337 U. S. 489, 93 L. Ed. 1200; U. S. vs. Brown, 348 U. S. 110, 99 L. Ed. 139, Buer vs. U. S., 241 F. 2d 3 (7th Cir.) certiorari denied 353 U. S. 974, 1 L. Ed. 2d 1136, Knecht vs. U. S. 242 F 2d 929 (D. C. Pac.) and Chapin & Sydlik vs. U. S., 258 F. 2d 465.

STATUTES INVOLVED

The statutes involved are 28 U. S. C. A. §§1346(b). 2671 and 2674.

Section 1346(b) provides:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee

of the Government while acting within the scope of his office or employment, under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2671 provides:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

'Federal agency' includes the executive departments and independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106."

Section 2674 provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

CONCISE STATEMENT OF THE CASE

The deceased was an Air Force Sergeant, Robert F. Callaway, attached to the air base at Ellsworth Air Force Base in South Dakota. At the time of the accident, he was riding as a passenger in a car of a fellow Air Force Sergeant named Lange along with another Air Force Sergeant and they were on their way to Seattle, Washington. Their time was their own from May 2, 1957 to May 8, 1957 and they could select any mode of transportation they chose and could go by any route they desired. In other words, they were *free* until they had to report in Seattle on May 8, 1957, (R. 17) for schooling in a new model aircraft.

The car in which they were riding belonged to the companion, Sgt. Lange. As a matter of fact, the travel orders under which the three of them were traveling provided "utilization of any government facility is deemed impractical and would adversely affect the performance of the assigned mission." (R. 7).

Not because of the orders, but solely of their own free wills and accords the Air Force sergeants decided to go to Seattle by way of Helena, Montana and on May 3, 1957, in the afternoon as they were proceeding in Sgt. Lange's car between Townsend, Montana, and Helena, Montana, they were run into from behind by the defendant W. L. Garber.

W. L. Garber was a stranger to them and in another branch of the service. He was a recruiting officer of the United States Navy and the District Court found that he negligently drove his automobile in the performance of his duties into the rear end of the automobile in which the deceased was riding. This caused the automobile in which deceased was riding to go out of control and on to the wrong side of the road where it collided with one Angus McArthur, a civilian, and in that collision Sgt. Callaway received injuries from which he died about one hour after the accident.

Three actions were brought against W. L. Garber and the United States of America. Two of them were the suits involved in this appeal and the other was by the civilian Angus McArthur. In the McArthur case, Sgt. Lange was also named as a defendant and McArthur alleged Sgt. Lange was acting within the scope of his employment by the United States. At a pre-trial conference the U. S. District Attorney, in support of his motion that the action

should be dismissed as against Sgt. Lange, relied upon the case of Chapin and Sydlik vs. U. S., 258 Fed. 2d 465 and contended that Lange was not acting in the scope of his employment at the time of the accident. The trial judge ordered the three actions consolidated for trial and a recovery was had by Angus McArthur and he was paid $30,827.67 by the United States of America. The trial judge found Garber's negligence the sole proximate cause of the accident.

The trial judge purported to distinguish the cases at bar from the Brooks case, supra, by emphasizing that "Brooks was on *furlough*, driving along the highway, under compulsion of no orders or duty and on no military mission." (R. 19). Sgt. Lange and Sgt. Strong, the two airmen who were traveling with the deceased, both testified and their testimony was undisputed that they were *free* between the time they left Ellsworth Air Force Base on May 3rd until the time they were to report in Seattle, Washington on May 8 (R. 11, 17).

Both of the lower courts refused to concede that the status of the deceased and the status of Brooks in the Brooks case, supra, were similar. Both of the lower courts were of the opinion that the Feres case, supra, controlled.

ARGUMENT AMPLIFYING REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The United States Circuit Court of Appeals for the Ninth Circuit admits that the instant cases are not within the reasons for the rule in the Feres case, supra, and quotes what the United States Supreme Court in U. S. vs. Brown, 348, U. S. 110, 99 L. Ed. 139, 143 stated were the reasons for the Feres rule, namely:

> " 'The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character'."

The United States Court of Appeals for the Ninth Circuit then goes on to say that the instant cases can find no shelter within those reasons, but since the United States Supreme Court did not negate or modify the Feres rule by the Brown case, it, the United States Court of Appeals for the Ninth Circuit, was not going to do so. (App. xii).

The United States Supreme Court should now apply the legal maxim "cessante ratione legis, cessat ipsa lex" and decide the instant cases in favor of petitioners. Surely this Court will not apply the Feres rule to these cases when none of the reasons for the rule are present herein.

2. The United States Court of Appeals for the Ninth Circuit admitted that the facts in the cases at bar *could* be said to be not within the contemplation of the Supreme Court of the United States in deciding the Feres case and then the Court went on to recite: "If such be true, it is not for this Court to make the distinction."

3. The decision as promulgated by the United States Court of Appeals for the Ninth Circuit is in conflict (a) with the case of Knecht vs. U. S. 242 Fed. 2d 929, decided by the United States Court of Appeals for the District of Pennsylvania. In the Knecht case, which is on all fours with the instant cases, the plaintiff airman had an official *pass* allowing him to be absent from 5:00 p. m. on October 18th to 8:00 a. m. on October 19th. About 3:00 a. m. on the 19th, the airman was on his way back to his barracks to get some sleep before reporting for duty at 8:00 a. m. The airman was killed when the car in which he was riding was struck by a negligently driven United States government vehicle. The defense was that there could be no recovery since Knecht was in the service. The District Court and the Circuit Court of Appeals held otherwise. The trial court at p. 789 of 144 F. Supp., said:

> "Knecht was away from the base on a pass, his time was his own and his activities were not controlled by his military status. True, he was returning to the base and he was probably returning at that given time for the purpose of getting a few hours sleep

> before having to report for duty at 8 a. m. that morning. Any justification for holding that this activity was 'in the course of activity incident to service' was to follow at 8 a. m. would necessarily be based only upon the fallacy 'post hoc, ergo propter hoc."

(b) with Buer vs. U. S. 241 Fed. 2d 3, (7th Cir.) certiorari denied 353 U. S. 974. That case involved a claim by a service man on leave who had been injured by a government vehicle and was subsequently operated upon by government doctors. The gravaman of the case was malpractice by the doctors and in denying recovery the court relied upon the Feres case. In the opinion, however, the court had this to say about the Brooks case, supra, "Had plaintiff, while on leave, been injured on the North Carolina highway by a government truck and had he sought damages because of those injuries, clearly the case would come within the rule of Brooks vs. U. S."

4. The decision as promulgated has decided an important question of Federal law which has not been, but should be, settled by this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In the Chapin and Sydlik case, supra, a serviceman who was named as a defendant along with the United States was acting in a situation practically identical with that in which Sgt. Lange and Sgt. Callaway were acting. The

United States successfully defended in that case on the grounds that the serviceman was not within the scope of his employment. Now, when a serviceman in a similar situation is a plaintiff and sues the government, the Circuit Court of Appeals for the Ninth Circuit says the suit won't lie because the serviceman was acting within the scope of his employment. Thus, the United States Supreme Court should exercise its power of supervision and determine whether the United States in these Federal Tort Claims suits can blow hot or cold at the same time so far as determining what is meant by "scope of employment."

5. The decision as promulgated by the United States Court of Appeals for the Ninth Circuit is in conflict with the applicable decisions of this Court so as to call for an exercise of this Court's power of supervision. (a) It conflicts with Brooks vs. U. S. 337 U. S., 49, 93 L. Ed. 1200. In the Brooks case the service man was at home on what was called a furlough. This did not mean that he was out of the service. He was still under orders telling him to report some place at some time. He was free to do as he pleased until the expiration of his furlough. Callaway was free to do as he pleased until the morning of May 8, 1957 when he had to report at Seattle, Washington. (b) It places undue emphasis upon the word "furlough" and thus conflicts with U. S. vs. Brown, 348 U. S. 110, 99 L. Ed. 139. In that case both the majority and minority

of this Court discussed the Brooks case. In discussing the Brooks case, neither the majority nor the dissenting opinions mentioned the word "furlough." The majority opinion referred to "service man on leave." The dissenting opinion recites "the two soldiers were off duty."

CONCLUSION

If this Honorable Court intended by its statement of the reasons for the Feres case which is set forth by this Court in United States vs. Brown, 348 U. S. 110, 99 L. Ed. 139, 143, to limit the application of the Feres rule to situations where the reasons are equally applicable (and there can be no other logical purpose for this Court's statement) then it should make that intention clear for the guidance of the lower courts and if such was this Court's intent and if we accept the Circuit Court of Appeals' determination that the reasons are not applicable in the instant cases, then these cases must be reversed.

It is an acrid commentary on, and a glaring anomaly in the law, if the duty of a young man to serve his country is not matched by a reciprocal duty on the part of society to protect those who serve in the armed forces. The Government is a shield as well as a sword. The Government should cast a mantle of protection around Callaway so that his widow and their children are not denied redress for the negligent acts of a person (a stranger,

Garber) in another branch of the service. To deny relief to these plaintiffs is in effect telling them to bind up their own wounds resulting from "official" acts of a negligent and reckless Government agent causing the destruction.

It is respectfully submitted that this Court should issue a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit and after a hearing remand these actions to the United States District Court for the District of Montana with directions.

MYLES J. THOMAS,
517 Power Block—P. O. Box 235
Helena, Montana
Attorney for Petitioners

FLOYD O. SMALL,
Montana Club Building
Helena, Montana
Of Counsel

APPENDIX

FINDINGS OF FACT NO. VI.

"* * * That the three Air Force Sergeants were traveling under orders in Sergeant Lange's privately owned automobile from the Ellsworth Air Force Base at Rapid City, South Dakota, to the Boeing Aircraft Plant at Seattle, Washington, for the temporary duty to attend a training school to receive training in a new model of aircraft which was to be received at Ellsworth Air Force Base, and at the completion of such training said men were to return to their permanent station at Ellsworth Air Force Base; that in performing such travel from their permanent station for temporary duty at a training school, said Air Force Sergeants were in line of duty for the United States Air Force on May 3, 1957, at the time the above-mentioned collision occurred."

CONCLUSIONS OF LAW

"III. That on May 3, 1957, at the time of said accident, said Sergeants Carl J. Lange, George F. Strong and Robert F. Callaway were traveling under orders of their Commanding Officer and were in line of their duties as Sergeants in the United States Air Force.

"IV. That by virtue of the fact that said Robert F. Callaway was acting in line of duty as a member of the United States Air Force at the time that he received the

injuries which resulted in his death due to the negligence of said W. L. Garber, the plaintiffs in Cause No. 750, Mrs. Robert F. Callaway, Robert F. Callaway, Jr., Sandra K. Callaway and Richard E. Callaway, and the plaintiff in Cause No. 760, Stanley P. Sorenson, as Administrator of the Estate of Robert F. Callaway, deceased, are not entitled to recover anything from the United States of America."

MEMORANDUM

Robert F. Callaway in Line of Duty

"Under the Supreme Court decisions of Brooks vs. United States, 337 U. S. 49, and Feres vs. United States, 340 U. S. 135, no recovery can be allowed in the Callaway and Sorenson cases, Nos. 750 and 760, respectively, if the deceased Robert F. Callaway was in line of duty at the time he received the injuries from which he died. In the Feres case, supra, at page 146, the Supreme Court in pointing out why recovery had been allowed in the Brooks case, said:

> " 'The injury to Brooks did not arise out of or in the course of military duty. *Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission.*'

"The italicized portion of the above quotation points up the difference between Brooks' situation and that of Callaway in the instant case. Callaway was not on furlough; he was traveling along the highway under com-

pulsion of orders from his commanding officer, and he was on a military mission as a result of those orders.

"The Supreme Court went on in the Feres case, supra, at page 156, and said:

" 'We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'

"Certainly Callaway's traveling orders for temporary duty at the service school in Seattle, Washington, was an activity incident to his service in the United States Air Force.

"The Supreme Court went on to say:

" 'Without exception, the relationship of military personnel to the government (insofar as the question of service connected injuries are concerned) has been governed exclusively by federal law. We do not think that Congress, in drafting this Act (Federal Tort Claims) created a new cause of action dependent on local law for service-connected injuries or death due to negligence.'

"So the question of whether Callaway's injuries and death were service-connected, thus preventing a recovery under the Federal Tort Claims Act, is a question to be decided by federal law, and under the tests suggested by

the Feres decision, the injuries and death of Callaway must be found to be service connected. However, the result under the circumstances of this case would be no different even if the question were governed by Montana law. The only basis upon which counsel urges that Callaway was not in the line of duty at the time of the accident is the fact that he signed out of Ellsworth Air Force Base in South Dakota on the morning of May 3, 1957, and was not required to report to the school in Seattle until 8:00 o'clock on the morning of May 8th, and that in between those times he was free to get to Seattle by any route of travel or mode of transportation that he chose. In Webster vs. Mountain States Telephone & Telegraph Co., supra, an identical situation prevailed. Webster, the employee, was relieved of his duties in Roundup, Montana, at noon on a Friday, and was not required to report for work until the following Monday in Miles City. He was free to go to Miles City by whatever route or mode of transportation he chose, or at any time he desired, just so he was at Miles City, Monday morning. Under the circumstances he was held by the Montana Supreme Court to have been in the course of his employment while making the journey.

"Therefore, under the Federal law enunciated in the Feres case, or the Montana law enunciated by the Webster case, Callaway was in the course of his employmen' at

the time he met his death, and under the Feres case and the Brooks case, recovery cannot be had for his death under the Federal Tort Claims Act.

W. D. MURRAY,

United States District Judge."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,889
April 21, 1961

MRS. ROBERT F. CALLAWAY, individually, MRS. ROBERT F. CALLAWAY, as Mother and Next Friend of her Minor Children, ROBERT F. CALLAWAY and RICHARD E. CALLAWAY,

Appellants,

vs.

W. L. GARBER and UNITED STATES OF AMERICA,

Appellees,

STANLEY P. SORENSON, as Administrator of the Estate of Robert F. Callaway, Deceased,

Appellant,

vs.

W. L. GARBER and UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District for the District of Montana, Helena Division

BEFORE: CHAMBERS, ORR, and HAMLIN, Circuit Judges ORR, Circuit Judge:

On May 3, 1957, W. L. Garber, a recruiting officer in the United States Navy, while operating his car on Navy business on a highway in Broadwater County, Montana, negligently drove said car into the rear-end of another auto which was owned and operated by Sergeant Carl J. Lange of the United States Air Force. Riding with Sergeant Lange at the time were two other Air Force sergeants, Robert F. Callaway and George F. Strong. The impact of the collision forced Sergeant Lange's car into the opposite lane where it collided with an auto being driven by one

Angus McArthur, a civilian. Sergeant Callaway received injuries from which he died about one hour after the accident.

At the time of the accident the three Air Force sergeants in Lange's car were traveling from Ellsworth Air Force Base in South Dakota to Seattle, Washington, to attend a special school at the Boeing Aircraft Plant in Seattle for six weeks. Their orders required them to leave South Dakota on May 2nd and report in Seattle on May 8th, but no means of transportation was provided or specified and they were free to do anything they wished and travel in any manner they desired so long as they reported in Seattle on May 8th. At the end of the six weeks of schooling they were to return to Ellsworth Air Force Base in South Dakota, and during the entire period they were to remain assigned to that base and subject to the orders of its Commander. The purpose of their journey was to receive training with respect to a new model aircraft which was to be received at Ellsworth Air Force Base.

Mrs. Robert F. Callaway, individually and as mother and next friend of her minor children, brought a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., and against W. L. Garber, alleging that Sergeant Callaway's death had been caused by Garber's negligent driving while he was within the scope of his employment for the Government. Stanley P. Sorenson, administrator of Sergeant Callaway's estate, brought a similar suit. The United States District Court for the District of Montana entered judgment for the defendants in both suits, holding that Sergeant Callaway was acting in the line of duty at the time he was fatally injured and that the doctrine of Feres v. United States, 340 U. S. 135 (1950), therefore controls the case. Appellants seek review of these findings.

The Feres case, supra, was actually a consolidation of three different suits by or on behalf of servicemen injured while on active duty and as a result of negligence of other servicemen; one suit involved a soldier who had perished by fire while in his barracks, and the other two involved soldiers who had suffered injuries while receiving treatment from army surgeons. The Supreme Court in holding for the Government, promulgated a rule that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U. S. at 146. In reaching this decision the Court mentioned the following considerations: (1) The Tort Claims Act was designed to extend a remedy to those who had previously been without one, and this does not include servicemen, who are allowed compensation for service injuries under several special statutes. In addition the fact that Congress failed to provide any adjustment between those special remedies and the Tort Claims Act indicates that it did not intend both to apply at once. These considerations alone would not seem to be determinative since in Brooks v. United States, 337 U. S. 49 (1949), and in United States v. Brown, 348 U. S. 110 (1954), an injured serviceman and a veteran were allowed to recover under the Tort Claims Act even though they were covered by special injury compensation statutes. (2) Under the Tort Claims Act the United States is only liable to the extent a private individual would be liable under like circumstances.* Con-

*Section 1346(b), of Title 28, U.S.C., provides in pertinent part:
"(b) Subject to the provisions of Chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

sidering the unique status of the wronged and the wrongdoer in these service injury cases as part of the circumstances, there is no analogous private situation and thus no analogous private liability to apply. (3) The Tort Claims Act rests liability on the law of the place where the act or omission occurred, and it would be irrational to have this rule govern servicemen on active duty since they have no power to choose or determine where they will be at any given time. It is arguable that this consideration is not present in the instant case since Sergeant Callaway was free to go to Seattle in whatever way and by whatever route he chose.

The Trial Court held that this case falls within the rule in Feres v. United States that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The question is: did the injury to Callaway arise out of or in the course of activity incident to service? His travel at the time of the injury was incident to service. Without travel he could not respond to the orders of his superior. The objective of the orders was to provide training. The place where that training was to be provided was at a distance from his base. The travel was as much a part of his duty as the training itself. The person responsible for the injury was another serviceman following out and in the course of his duties.

Appellant argues that Chapin v. United States, 258 F. 2d 465 (9th Cir. 1958), should control the instant case. In the Chapin case a private citizen was injured by the negligence of a serviceman who was driving his own car in the course of a permanent change of duty station. This court held that the question whether the United States

was responsible for the serviceman's negligent acts is determined by the "respondeat superior" laws of the state where the accident occurred, and under the California respondeat superior laws this serviceman was not acting within the scope of his employment. That the local respondeat superior laws determine the responsibility of the United States for the negligence of servicemen is well established. Williams v. United States, 350 U. S. 857 (1955). However, assuming that such responsibility has been thus established, whether the injured party can collect from the United States when the injured party is also a serviceman is a matter for federal law. Feres v. United States, 340 U. S. 135, 143-144 (1950). The test here is whether the injured serviceman was engaged in "activity incident to service" at the time he was injured. That this is a much broader test than the "scope of employment" test used for respondeat superior purposes is clear from the facts of the Feres case itself and from the numerous circuit court cases which have interpreted and applied Feres. See Preferred Insurance Co. v. United States, 222 F. 2d 942 (9th Cir. 1955), denying servicemen recovery for damage to their housetrailers caused by an airplane crash while the trailers were on the Air Force Base, because the trailers were "damaged incident to . . . . military service." 222 F. 2d at 948. See also Zoula v. United States, 217 F. 2d 81 (5th Cir. 1954). In the instant case, unlike Chapin, the negligence of the Government is admitted and the issue is whether the injured party is barred from recovering by the fact that he was a serviceman—a question to which the rule announced in Feres must be applied.

We are unable to determine wherein the instant case fails to fall within the rule announced by the Supreme Court in Feres. True, the facts here are of an isolated nature and could be said to be not within the contem-

plation of the Supreme Court in deciding the Feres case. If such be true, it is not for this court to make the distinction. The Supreme Court in United States v. Brown, supra, has indicated the basic reasons underlying the Feres rule. "The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character." 348 U. S. at 112. The instant case can find no shelter within those reasons, since the negligent and injured parties here were members of different branches of the service and were engaged in entirely diffrent and unconnected activities at the time of the accident. However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case.

AFFIRMED.

(Endorsed) Opinion Filed April 21, 1961.

Frank H. Schmid, Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 206

MRS. ROBERT F. CALLAWAY, ET AL., PETITIONERS,

v.

W. L. GARBER AND UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (Pet. App. i; R. 17-21)[1] is not reported. The opinion of the court of appeals (Pet. App. vii) is reported at 289 F. 2d 171.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1961. The petition for a writ of certiorari

[1] All record references are to the pages of the "Transcript of Record" printed for the use of the court of appeals and filed here pursuant to Rule 21 of this Court.

was filed on July 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly found that the death of a serviceman, while he was on a military mission and traveling under compulsion of orders from his commanding officer, was incident to his military service and [illegible] would not furnish a basis for a tort action against the United States under the Federal Tort Claims Act.

STATUTE AND REGULATIONS INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows (28 U.S.C. 1346(b), 2674):

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

The Joint Travel Regulations for the Uniformed Services, paragraphs 4200, 4203(3)(a), 4203(b)(1), and

STATEMENT

On May 3, 1957, W. L. Garber, a Chief Petty Officer in the United States Navy who was assigned to duty as a recruiting officer, was operating his own automobile in a westerly direction on a highway in Broadwater County, Montana. As he was thus proceeding, Garber negligently drove his automobile into the rear end of another westbound car, which was owned and operated by Sergeant Carl J. Lange of the United States Air Force (R. 4). Riding in Lange's car with him were two other Air Force sergeants, Robert F. Callaway and George F. Strong (*ibid.*). The impact forced Lange's car to go into the eastbound lane of the road where it collided with an oncoming car operated by a civilian, Angus McArthur. Sergeant Callaway received injuries from which he died about one hour after the accident. McArthur was seriously injured (R. 4-5).

At the time of the accident, Callaway and the other two Air Force sergeants were traveling under orders from Ellsworth Air Force Base, South Dakota, to the

Boeing Aircraft Plant at Seattle, Washington, for the purpose of attending, as temporary duty, a training school at the plant (R. 17-18). The sergeants were assigned to duty at Ellsworth Air Force Base as mechanics, and the sole purpose of their making the journey to Seattle was to receive training with respect to a new model of aircraft that was to be received at Ellsworth (R. 16-18). Upon completion of their six-week training course, the men were to return to their permanent station at Ellsworth (R. 7, 18).

The airmen's orders did not direct the utilization of a particular mode of transportation and, accordingly, they were authorized to proceed to Seattle in Lange's private automobile, as they did (R. 7, 15). Since their travel to Seattle was being undertaken in connection with their military duties, they were entitled to be reimbursed for their transportation expenses at the rate of five cents per mile and to receive a per diem allowance. Joint Travel Regulations for the Uniformed Services, para. 4203(3)(a), para. 4204 (5) (Appendix, *infra*, pp. 13-15).

As a result of Callaway's death while he was in military service, the United States Veterans Administration awarded to the sergeant's family substantial veterans' benefit payments, including Dependency and Indemnity Compensation.[2] In order to recover dam-

[2] The information concerning the nature and extent of the award of veterans' benefits by reason of Callaway's death is contained in a letter from the Veterans Administration to the Civil Division of the Department of Justice, which is reprinted in the Appendix, *infra*, at pp. 15-17. This letter is also set forth in the government's brief in the court below, at pages 25-27.

ages from the United States in addition to the administrative benefits, petitioner Callaway, individually (as Sergeant Callaway's widow) and as mother and next friend of her minor children, brought the present suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (*supra*, p. 2), and against Garber, alleging that Callaway's death had been caused by Garber's negligent driving while he was within the scope of his employment by the government. Petitioner Sorenson was appointed administrator of Callaway's estate, and he brought a similar suit against the United States and Garber. Angus McArthur filed an action against Garber, the United States, and Lange. All of these suits were brought in the United States District Court for the District of Montana and were consolidated for trial.

The district court held that Garber had been acting in the scope of his employment as a Navy Recruiter at the time of the accident. However, it denied recovery against the United States in the suits brought by petitioners on the ground that Callaway's death had arisen out of activity incident to his military service (Pet. App. ii).[3] In this connection, the district court noted that, at the time of his death, Callaway was acting "in line of duty for the United States Air Force," that "he was not on furlough" but "was trav-

[3] McArthur, the civilian driver of the third automobile, was awarded a recovery of approximately $30,000 against the United States. This judgment has been paid by the government. McArthur's action was dismissed with respect to the defendants Garber and Lange, and petitioners' actions were dismissed with respect to defendant Garber. Garber's liability was not in issue in the court below, nor is it in issue here.

cling along the highway under compulsion of orders from his commanding officer, and he was on a military mission as a result of those orders" (Pet. App. i, ii-iii). In dismissing the complaints, the court relied on this Court's decision in *Feres* v. *United States*, 340 U.S. 135, in which it was held that the government is not liable under the Federal Tort Claims Act for service-incident injuries or deaths of servicemen (Pet. App. i-v).

On petitioners' appeal, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. vii-xii). That court, in affirming the district court's finding that Callaway's death, while he was performing directed travel, had been incident to military service, stated:

> The queston is: did the injury to Callaway arise out of or in the course of activity incident to service? His travel at the time of the injury was incident to service. Without travel he could not respond to the orders of his superior. The objective of the orders was to provide training. The place where that training was to be provided was at a distance from his base. The travel was as much a part of his duty as the training itself. (Pet. App. x.)

ARGUMENT

1. In *Feres* v. *United States*, 340 U.S. 135, 146, this Court ruled that the United States is not liable under the Federal Tort Claims Act for injuries or deaths of servicemen that "arise out of or are in the course of

activity incident to service." Petitioners, while recognizing the force of this firmly established and consistently reapplied rule,[4] seek to escape its impact by arguing that the activities involved in the present litigation were not in fact incident to Sergeant Callaway's service. The short answer to this argument is that both courts below, in reviewing the evidence, found that the serviceman's death did in fact result from activities that were incident to his military service. There is no warrant for still further review here of those concurrent and dispositive factual findings, which have abundant support in the record.

The critical facts are not disputed. Callaway's orders directed him to proceed from Ellsworth Air Force Base to the Boeing plant in Seattle in order that he might perform the military duty of attending a training school there (R. 7). Callaway and the other airmen with whom he was riding were in the process of driving to Seattle at the time of the ac-

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[4] This Court's decision in *Feres* handed down over ten years ago, has been reaffirmed on many occasions. See, e.g., *United States* v. *Brooks*, 348 U.S. 110, 113 (1954), where the Court stated: "We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." See, also, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *Johansen* v. *United States*, 343 U.S. 427, 432 (1952). The lower courts throughout the country, including the court below in the present case, have consistently applied the *Feres* rule. See, e.g., *Norris* v. *United States*, 229 F. 2d 439 (C.A. 2), affirming 137 F. Supp. 11, on the district court's opinion; *Odlum* v. *United States*, 239 F. 2d 850 (C.A. 6); *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942 (C.A. 9), certiorari denied, 350 U.S. 837; *Zoula* v. *United States*, 217 F. 2d 81 (C.A. 5); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *United States* v. *United Services Automobile Ass'n*, 238 F. 2d 364 (C.A. 8).

cident (R. 8), and they were making the journey for the sole purpose of complying with their orders and of fulfilling their military mission (R. 16). On these facts, it seems clear that the accident that befell Callaway arose directly out of his military service. It was his status as a serviceman traveling under orders that placed him in the "zone of special danger," cf. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-07, and his death under these circumstances was plainly an incident of his military service within the *Feres* doctrine.

The fact that Callaway and the other airmen were making the trip to Seattle by private automobile does not lead to a contrary conclusion. Their orders left them free to select whatever form of transportation they desired, and they were thus authorized to utilize their private automobile (R. 7, 9, 11). But the fact that they chose that form of transportation rather than, say, commercial transportation did not convert the trip into a personal mission undertaken by the airmen for their own benefit. The journey to Seattle was travel in connection with temporary duty, so that Callaway and the other airmen were entitled to reimbursement for traveling expenses irrespective of the mode of transportation they employed. Joint Travel Regulations for the Uniformed Services, para. 4203, 4204 (Appendix, *infra*, pp. 13-15). It was a journey necessitated by their military employment, and the perils of the journey — whether it was undertaken by train, airplane or private automobile — were perils incident to that employment.

2. The conflicts petitioners assert with several other

decisions are illusory. Thus, in *Brooks* v. *United States*, 337 U.S. 49, recovery was allowed under the Federal Tort Claims Act only because, as the Court pointed out in its later *Feres* decision, Brooks was "on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. 135, 146. Callaway, however, was injured while traveling to Seattle, *under compulsion of orders and on a specific military mission*.

Nor is there any conflict with *United States* v. *Brown*, 348 U.S. 110. There, the Court held that allegedly negligent treatment received in a Veterans Administration hospital by a veteran, after his discharge, had not been sustained as an incident of his military service. The Court emphasized that (348 U.S. 110, 112), "[t]he injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." Callaway, of course, was on active duty and subject to military discipline when he was killed.

Similarly, *Baer* v. *United States*, 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974, and *Knecht* v. *United States*, 242 F. 2d 929 (C.A. 3), present no conflict with the present decision. Indeed, in *Baer*, as petitioners recognize (Pet. 10), the injury was held to be service-incident and hence not actionable under the Federal Tort Claims Act. In *Knecht*, relief was granted under the Act because, as in *Brooks*, the injured serviceman had been on leave or furlough at the time of the accident. Callaway, however, was not on furlough or

pass, engaged in his own pursuits at the time of his death. He was on official travel status, performing functions directed by his commanding officer.

3. Petitioners' reliance (Pet. 10-11) on *Chapin* v. *United States*, 258 F. 2d 465 (C.A. 9), certiorari denied, 359 U.S. 924, rehearing denied, 359 U.S. 976, is also misplaced. That case involved the concept of "within the scope of employment" for purposes of the doctrine of *respondeat superior*,[5] and it has no bearing on the question of whether a serviceman's injury was incident to his military service. As the court below correctly observed, the "incident to service" test "is a much broader test than the 'scope of employment' test used for respondeat superior purposes" (Pet. App. xi).

The "incident to service" test (concerned as it is with the relationship between employee's injuries and the conduct of the employer's business) is analogous to the concept of "course of employment," which was developed in connection with workmen's compensation. While the theory of *respondeat superior* is that an employer is vicariously liable for third-person injuries only by reason of acts directly furthering the employer's conduct of his business, the workmen's compensation doctrines uniformly reflect a broader interpretation consistent with the social purpose underlying workmen's compensation legislation. Thus, this Court has recognized that workmen's com-

[5] The *Chapin* case decided that, under the law of California, a soldier who utilized his own automobile to effect a permanent change of station and collided with the plaintiffs on the highway was not within the scope of his employment at the time so as to make the government liable under the Federal Tort Claims Act on the principle of *respondeat superior*.

pensation concepts of "course of employment" are not confined by common-law notions of "scope of employment," *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-07.[6]

Accordingly, there is no basis for making the *Feres* doctrine in any way dependent upon the more rigorous standards applicable in determining *respondeat superior* liability. However, even if it was, it is interesting to note that, within the context of the *respondeat superior* liability cases, there is ample authority for the proposition that Callaway's death on the highway was directly related to his employment. See, *e.g.*, *Webster* v. *Mountain States Tel. & Tel. Co.*, 108 Mont. 188, 89 P. 2d 602; *Hinson* v. *United States*, 257 F. 2d 178 (C.A. 5); *United States* v. *Mraz*, 255 F. 2d 115 (C.A. 10); *Cooner* v. *United States*, 276 F. 2d 220 (C.A. 4).

4. One further point must be noted. In closing, the petition urges that the result below has the unjust effect of denying Sergeant Callaway's family redress against the United States for his death (Pet. 12-13). But Veterans Administration files show that Sergeant Callaway's family has been receiving veterans' benefits in substantial amounts from the federal government by reason of his death. (Appendix, *infra*, pp. 15-17). These administrative benefits, made available under the statutory system for compensating servicemen and their dependents for service-caused injuries and deaths,

[6] See also *Conversions & Services, Inc.* v. *Roach*, 204 F. 2d 499, 501 (C.A. 1) (Magruder, J.): "The liability of an employer to pay workmen's compensation to an injured employee, and the liability of an employer to a third person on the doctrine of *respondeat superior*, depend upon entirely distinct considerations."

compare "extremely favorably" with those provided by "most workmen's compensation statutes." See *Feres* v. *United States*, 340 U.S. 135, 145. Just as the provisions for workmen's compensation benefits typically relieve the private employer from any further liability for the death or injury to his employee even though the injured employee might have been able to obtain a slightly greater recovery by suit if he could establish the employer's negligence, the analogous and fully as generous benefits available to servicemen and their dependents for the servicemen's injuries or deaths relieve the United States of any additional liability. Thus restricting servicemen or their dependents to the benefits of the military and veterans laws cannot be viewed as unfair or discriminatory. *Feres* v. *United States*, 340 U.S. 135; *Johansen* v. *United States*, 191 F. 2d 162 (C.A. 2), affirmed, 343 U.S. 427, for such relief is not subject to the uncertainties, expense and delay of establishing negligence, but is guaranteed through direct, administrative payments.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
MARK R. JOELSON,
Attorneys.

SEPTEMBER, 1961.

APPENDIX

1. Joint Travel Regulations for the Uniformed Services (as effective 3-1-57):

Part E: Temporary Duty Allowances in the United States

4200 General
(Ch. 13)

Unless otherwise specifically provided for or restricted in these regulations, the per diem allowances prescribed in this Part are applicable for all periods of temporary duty and travel in connection therewith, including but not limited to the following:

1. periods of necessary delay awaiting further transportation.
2. periods of delay at ports of embarkation and debarkation in connection with a permanent change of station.
3. periods of temporary duty directed in a permanent change of station order.

* * * * *

4203 Transportation
(Ch. 44)

* * * * *

3. Monetary Allowance in Lieu of Transportation

a. *Travel at Personal Expense.* Except as provided in subpar. b, when authorized travel is performed at personal expense, the member will be reimbursed a monetary allowance in lieu of trans-

portation at the rate of five cents per mile for the official distance.

b. *Travel by Privately Owned Conveyance*

(1) *Policy.* It is the policy of the uniformed services to "authorize" (as distinguished from "permit") members to travel by privately owned conveyance whenever such mode of transportation is acceptable to the member and is determined to be more advantageous to the Government. This determination should be based on the facts in each individual case and authorization should not be granted unless the order-issuing authority is convinced that such mode of travel is clearly more advantageous to the Government than travel by Government conveyance or public carrier. The advantage gained by the Government may be, for example, a more efficient, economical, or expeditious accomplishment of Government business, short trips over routes where commercial transportation is nonexistent or would be so time-consuming as to unduly delay public business.

* * * * *

4204 TIME ALLOWABLE IN COMPUTATION OF PER DIEM
(Ch. 13)

* * * * *

5. TRAVEL BY PRIVATELY OWNED CONVEYANCE. When travel orders specifically state that travel by privately owned conveyance is more advantageous to the Government, per diem allowances are payable for the actual time necessary to perform the directed travel. When travel orders do

not contain such statement, the rate of per diem applicable and the period for which per diem is payable for travel by privately owned conveyance shall be for the time actually consumed and at the rate applicable for travel by privately owned conveyance, the total amount payable not to exceed that payable for constructive travel by common carrier over the official route.

* * * * *

2. Letter from Veterans Administration to the Department of Justice.

V.A. SEAL

VETERANS ADMINISTRATION
Office of General Counsel
WASHINGTON 25, D. C.

SEP 14 1960

YOUR FILE REFERENCE:
IN REPLY REFER TO: 023B

Mr. George Cochran Doub
Assistant Attorney General
Civil Division
Department of Justice
Washington 25, D. C.

Attention: Chief, Appellate Section

Re: CALLOWAY, ROBERT F. XC-7 244 414

Dear Mr. Doub:

This refers to your informal request for a statement of benefits paid under veterans' laws on account of the death of the above-named veteran on May 3, 1957.

A copy of the "Enlisted Record and Report of Separation, Honorable Discharge", contained in the veteran's file, indicates that he first entered active Federal service with the National Guard on September 16, 1940; that he was discharged and reenlisted on September 20, 1941, at Camp Barkeley, Texas, and was separated on November 26, 1945, for the convenience of the Government. This form also contains the entry "4 years 10 months 25 days" under the heading "Prior Service". The file shows subsequent enlistments in the U.S. Air Force on April 19, 1946, April 19, 1949, June 14, 1950, and January 5, 1955 (for six years).

The Veterans Administration file reflects that the veteran was married to Ola Pearl Blair in San Antonio, Texas, on August 23, 1944; that Robert F. Calloway, Jr., was born of such marriage on April 7, 1945; that Sandra Kays Calloway, a daughter, was born on April 26, 1948; that another child, Richard Eliott Calloway, was born on April 3, 1955; that at the time of the veteran's death $10,000 National Service Life Insurance on the ordinary life plan was in effect under insurance number 3V 1912 58 91; that his wife, Ola Pearl Calloway, was the beneficiary of such insurance; that Ola Pearl Calloway filed a claim for such insurance on May 16, 1957; that she selected payment in 84 installments, and that such installments in the amount of $131.60 each have been paid commencing with the date of the serviceman's death and monthly thereafter. The final installment will be due on April 3, 1964.

The Veterans Administration file further reflects that pursuant to the claim of Mrs. Ola Pearl Calloway filed with the Veterans Administration on May 16, 1957, Dependency and Indemnity compensation was awarded to her in monthly installments of $149, predi-

cated upon a base pay of $304.20 (Grade E-7, M Sgt.), commencing May 4, 1957, under the provisions of Public Law 881, 84th Congress (now codified as subchapter II of chapter 13, Title 38, United States Code); that she continued to receive such benefits to June 1, 1958, when the amount was increased to $154 per month, predicated upon base pay of $350 a month for a serviceman with over 20 years' service (Public Law 85-422, May 20, 1958).

We trust that the above is the information which you desire; however, if you desire an authenticated statement of benefits paid, we will be glad to furnish such statement, upon request.

Very truly yours,

s W. C. Pickett,
WILBUR C. PICKETT,
Director, Litigation Service
For the General Counsel.